

**Testimony of
Gail Heriot
Member, United States Commission on Civil Rights
Before The Senate Committee on the Judiciary
on S. 909
“The Matthew Shepard Hate Crimes Prevention Act of 2009”
June 25, 2009**

Thank you for this opportunity to appear before the Senate Committee on the Judiciary. I am Gail Heriot, a member of the United States Commission on Civil Rights. Several weeks ago, the Commission voted to send a letter to members of the Senate Leadership opposing S. 909. I am here to answer any questions about that letter and to elaborate on my reasons as an individual commissioner for joining in that letter.

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Americans were horrified by the brutal murders of James Byrd in Jasper, Texas and Matthew Shepard in Laramie, Wyoming a decade ago.¹ More recently, the murders of Angie Zapata and Stephen Johns have shocked and saddened us all.² There ought to be a law, some people have said, preferably a federal one.

Of course, there is a law. Murder is a serious crime everywhere regardless of its motive and it has been from the advent of our civilization. Indeed, all but a few states have additional special hate crimes statutes. To my knowledge, no one is claiming that state or D.C. authorities have been neglecting their duty to enforce the law.³ Matthew Shepard’s tormentors

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James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, New York Times (October 13, 1998); Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, New York Times (June 8, 1998).

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Andrade Gets Life Plus 60 Years for Death of Transgender Woman, Denver Post (May 8, 2009); Christian Davenport, *Fast Action by Guards Saved Lives, Officials Say*, Washington Post (June 12, 2009).

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Indeed, few advocates of the proposed legislation are claiming that any state authorities should be faulted for neglecting their duty. For example, at a press conference in 1998 former Attorney General Janet Reno had this to say:

“[I]n many, many instances, the State and local authorities handle these cases. Their statutes are adequate. And they handle them in a very appropriate manner. What we need to do is to have the authority so that we can work with State and

are now serving life sentences; James Byrd's are on death row awaiting execution.⁴ A Colorado jury recently convicted Zapata's killer of murder, and the same will almost certainly happen to James von Brunn if he lives long enough to be prosecuted and is found competent to stand trial.

Of course, miscarriages of justice occasionally occur. The American system of criminal justice, which requires proof of guilt beyond a reasonable doubt, errs on the side of failure to convict the guilty. But I know of no reason to suspect that it errs in that direction more often in the case of crimes that are inspired by bias. To the contrary, I would suspect that given the high profile that serious bias crimes tend to have, it errs less often.

local authorities. And if they cannot handle it, if they do not have a statute that is applicable or that provides an appropriate sentence, then we will have the authority to proceed to protect what we believe to be clearly a Federal interest."

See U. S. Department of Justice, Transcript of Press Conference: The Honorable Janet Reno, Attorney General (January 8, 1998), available at <http://www.usdoj.gov/archive/ag/speeches/1998/jan0898.htm>.

Similarly, then-Deputy Attorney General Eric Holder testified at a Senate hearing, "I think it is fairly rare where we have hate crimes where local prosecutors, for inappropriate reasons decide not to pursue them." Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary, 106th Cong., 16 (1999). After an earlier hearing, in response to written questions that pressed him to identify cases in which state authorities, for whatever reason, had failed to vigorously prosecute, Holder referred to three cases in which state authorities had failed to bring criminal charges. See The Hate Crimes Prevention Act of 1998: Hearing on S. 1529 Before the Senate Comm. on the Judiciary, 105th Cong. 65 (1998)(statement of Eric H. Holder, Jr.). In all three federal prosecutions, however, the defendants were acquitted. See *id.* See also Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary, 106th Cong., 44 (1999)(statement of Burt Neuborne)(conceding that "it would ... be grossly unfair to local law enforcement officials to suggest that widespread reluctance exists in today's America to prosecute hate crimes"). See Christopher Chorba, The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act, 87 Va. L. Rev. 319, 346-53 (2001)(cataloging these arguments).

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Michael Janofsky, Parents of Gay Obtain Mercy for His Killer, New York Times (November 5, 1999). See Texas Department of Criminal Justice: Death Row Information, available at www.tdcj.state.tx.us/stat/deathrow.htm (giving status of Lawrence Brewer and John King). A third perpetrator, Shawn Berry, was sentenced to life in prison. See Third Defendant Is Convicted in Dragging Death in Texas, New York Times (November 19, 1999).

Unfortunately, tragedies like these bias-inspired murders quickly became an opportunity for political grandstanding. False and reckless claims that hate crimes are epidemic and on the rise are all too easily made.⁵ The proposed federal hate crimes legislation, however, which is being touted as a response to these murders, shouldn't have been treated as a mere photo opportunity. It's real legislation with real world consequences—and not all of them are good. A close examination of its consequences, especially its consequences for federalism and double jeopardy protections, is therefore in order.

Hate Crimes Statutes Generally: All hate crimes statutes, even those that have been adopted at the state level, raise significant issues:

* Why should James Byrd's or Matthew Shepard's killers be treated differently from Jeffrey Dahmer or Ted Kaczynski? Hate crimes are surely horrible, but there are other crimes that are equally, if not more, horrible.

* What happens if hate crimes statutes aren't enforced evenhandedly? Some crime statistics show that an African American is more likely to commit a racially-inspired

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According to FBI statistics for 2007, the most recent year available, 9006 hate crimes were reported in 2007. About two-thirds of the offenses were property defacement, such as through graffiti or of intimidation, such as through simple name calling. When the cases of simple assault are added, these minor offenses constitute about 80% of the whole. The 9006 figure was lower than the total figure reported for 2006 (9080) or the figure reported for 2004 (9035). It was somewhat higher than the figure for 2005 (8380). It was lower than the figure reported a decade earlier (9861). See James B. Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* 59 (1998)(arguing that in comparison with earlier periods of racial violence in American history, "it is preposterous to claim that the country is now experiencing unprecedented levels of [this kind of] violence"). A small number of crimes were, of course, very serious. For example, nine of the 9006 cases in 2007 were classified as murder or non-negligent manslaughter. No details were given. No one would deny that such horrific crimes frighten and intimidate law-abiding citizens. But casual statements that an epidemic of hate crimes is occurring can also frighten law-abiding citizens. Responsible people should avoid such loose talk. But see, e.g., Brad Knickerbocker, *National Acrimony and a Rise in Hate Crimes*, *Christian Science Monitor* (June 3, 2005), available at <http://www.csmonitor.com/2005/0603/p03s01-ussc.html>. See also Eddie B. Allen, *Is Obama's Presidency Sparking a Rise in Hate Crimes?*, *BETnews.com* (June 22, 2009), available at http://www.bet.com/News/news_is_obama_presidency_sparking_hate_crimes.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished&Referrer={0471DDF0-D0D8-48A8-9E30-AD D40CBE0269}

murder of a white than the other way around. Should all be punished as hate crimes? Or just those that fit the white supremacist James von Brunn stereotype?⁶

*What is gained by defining crimes in such a way that prosecutors must prove that the defendant's actions were motivated by racial or sexual animus? Is it enough to justify what is lost? When prosecutors are busy marshalling the extra evidence necessary for a hate crime prosecution, doesn't something have to give? Shouldn't our prosecutorial resources be deployed more efficiently?

* Will hate crimes statutes really make women and minorities feel that the law takes their safety seriously? Or might it have just the opposite effect? Sooner or later, a high profile crime will occur that some citizens strongly believe ought to be prosecuted as a hate crime. Rightly or wrongly, the prosecution will decline to prosecute it as such or the jury will convict only on the underlying crime and not on the hate crime charge. As a result, those citizens will wind up feeling cheated—when they would have felt completely vindicated had no hate crime statute ever existed.

Americans may disagree in good faith about whether such laws will in the end help or hurt harmony in the community. The proposed federal hate crimes legislation, however, has special problems of overreach with implications for federalism and double jeopardy protections. These problems should cause even those who favor state hate crime statutes to question the desirability of a federal statute.

Current Federal Law: Under current law, adopted in 1969, federal authorities may bring a prosecution for a crime because it was motivated by the victim's "race, color, religion or national origin" only to protect the victim's right to engage in certain "federally protected activities." For example, if the defendant prevented a black woman from enrolling in a public school or from travelling by common carrier because she is black, he has committed a federal offense.⁷ This statutory provision does not purport to be and is not a hate crimes statute. It was

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Christopher Chorba, The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act, 87 Va. L. Rev. 319 (2001).

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Specifically, 18 U.S.C. Section 245(b) states:

"Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

...

(2) any person because of his race, color, religion, or national origin and because he is or has been—

enacted to enforce the rights recognized by the courts or enacted by Congress during the Civil Rights Era. This was, of course, a time when there was genuine reason to fear that state authorities might not enforce the law.

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- (A) enrolling in or attending any public school or public college;
 - (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
 - (C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
 - (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
 - (E) travelling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
 - (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and
 - (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and;
 - (ii) which holds itself out as serving patrons of such establishments ...

shall be fined under this title, or imprisoned not more than one year, or both

The New Proposal: S. 909, entitled the “Matthew Shepard Hate Crimes Prevention Act of 2009” would remove the requirement that the victim be engaged in a federally-protected activity and would expand the list of protected categories to include actual or perceived “gender, sexual orientation, gender identity or disability” in addition to the “race, color, religion and national origin” already covered in the federal criminal code. Any crime fitting that description in which the defendant “willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon or an explosive or incendiary device, attempts to cause bodily injury to any person” may be fined and imprisoned for up to 10 ten years.⁸ If death results or “the offense includes kidnaping or an attempt to kidnap, aggravated

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Section 7 of S. 909 would amend Chapter 13 of Title 18 of the United States Code by adding the following:

“Section 249. Hate crimes acts

(a) In General-

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN- Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person--

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY-

(A) IN GENERAL- Whoever, whether or not acting under color of law, in

any circumstance described in subparagraph (B) ..., willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person--

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that--

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim--

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)--

sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill,” the defendant may be sentenced to life in prison.⁹

conduct; or

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the

(II) otherwise affects interstate or foreign commerce.

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Note, for example, that this provision could be interpreted to contain an element of strict liability not usually found in the criminal law. A defendant who slaps me in the face because I am a law professor may be guilty only of a misdemeanor even if, through some unforeseeable sequence of events, I end up dying as a result of the slap. (Perhaps I slip on a banana peel and hit my head in my effort to escape him.) On the other hand, if he slaps me because I am a woman and my death results in the same unforeseeable manner, S. 909 could be interpreted impose a penalty of life in prison.

These changes will vastly expand the reach of the federal criminal code.¹⁰ Back in 1998, attorneys at the Department of Justice, eager to expand federal authority, drafted language for the bill that would create federal jurisdiction over many cases that can't honestly be regarded as hate crimes—at least not as that term is understood by most Americans. The fact is that, despite the misleading use of the words “hate crime,” MSHCPA does not actually require that the defendant be inspired by hatred in order to convict. It is sufficient if he acts “because of” someone's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.¹¹ Consider:

*Rapists are seldom indifferent to the gender of their victims. They are always chosen “because of” their gender.

*A thief might well steal only from the disabled because, in general, they are less able to defend themselves. Literally, they're chosen “because of” their disability.

* Suppose a burglar is surprised when the husband and wife who reside in the home return earlier than expected. The burglar shoots the husband and kills him, but finding himself unable to shoot a woman, turns and runs. Again, literally, the husband was killed “because of” his gender.

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See The Hate Crimes Prevention Act of 1998: Hearing on S. 1529 Before the Senate Comm. on the Judiciary, 105th Cong. 30 (1998)(statement of Richard J. Arcara, on behalf of the Judicial Conference of the United States, that the proposed legislation “unquestionably creates the potential for the federalization of a significant number of state crimes”).

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It isn't necessary that the victim be chosen on the ground of his own perceived or actual status. It is enough, for example, that the victim is chosen on account of the perceived or actual status of some third person. For example, James von Brunn's brutal murder of Stephen Johns appears to have occurred because Johns was employed by a museum that memorializes the Jewish genocide during World War II. It probably would be unnecessary to prove under the proposed statute that Johns' own race was part of von Brunn's motivation; it would be enough if von Brunn was motivated by anti-semitism. In addition, however, an ordinary street criminal who robs a man because his travelling companion is wheelchair bound (and hence the man has his hands full pushing the wheelchair) would probably also be guilty under the proposed law.

This wasn't just sloppy draftsmanship. The language was chosen deliberately. Officials understandably wanted something susceptible to broad construction, in part because it makes prosecutions easier.¹² As a staff member of the Senate Committee on the Judiciary back in 1998, I had several conversations with DOJ representatives. They repeatedly refused to disclaim the view that all rape will be covered, and resisted efforts to correct any ambiguity by re-drafting the language. They wanted a bill with broad sweep. The last thing they wanted was to limit the scope of the statute's reach by requiring that the defendant be motivated by ill will toward the victim's group.¹³

Among other things, this creates an efficiency problem. State hate crimes laws give prosecutors an extra weapon, to be used or not used as they see fit. Federal laws, on the other hand, bring in a new cast of characters to prosecute the same crimes that are already being handled by state authorities. While efforts can be made to minimize the tension, turf battles are

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This inclusion of all rape as a "hate crime" would be in keeping with at least one previous Congressional statement. For example, Senate Report 103-138, issued in the connection with the Violence Against Women Act, stated that "[p]lacing [sexual] violence in the context of the civil rights laws recognizes it for what it is—a hate crime." See Kathryn Carney, Rape: The Paradigmatic Hate Crime, 75 St. John L. Rev. 315 (2001)(arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act, Harv. Women's L. J. 157 (1994)(arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, Twenty Years Later: The Unfinished Revolution, in Transforming a Rape Culture 47, 52 (Emilie Buchwald et al. eds., 1993) ("Rape is a hate crime, the logical outcome of an ancient social bias against women.").

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In response to this situation, Senator Edward Kennedy seems to have disclaimed any intention of covering all rape in the bill. See Edward Kennedy, Hate Crimes: The Unfinished Business of America, 44 Boston Bar J. 6 (Jan./Feb. 2000)("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes"). But his statement that "such aggravating factors as a serial rapist" will be necessary is not found in any language of the statute and is inconsistent with the refusal of Department of Justice representatives in their earlier discussions with me. It is evidently made in the faith that the Department of Justice will choose not to act except in aggravated cases.

inevitable as ambitious prosecutors jockey for position over big cases.¹⁴ The result is that resources are diverted away from frontline crime fighting.¹⁵

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Section 7 of S. 909 requires “certification” by the Attorney General or his designee before a prosecution may be undertaken. Although the purpose of this requirement appears to be to avoid turf battles between state and federal authorities, the standards for certification are extremely vague and flexible, and the certification process itself is itself an extra playing field upon which bureaucratic turf battles may be fought. Among other things, a federal prosecution may be undertaken if “the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence” or “a prosecution by the United States is in the public interest and necessary to secure substantial justice.” Concurrent state and federal investigations are permitted even without certification.

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For example, Chief Deputy and Prosecuting Attorney for Albany County (Laramie) Kenneth Brown testified at a Senate hearing against the proposed legislation in 1999 stating, “[W]e don't need brand new players on our team, unfamiliar with the territory, and at a huge additional expense to taxpayers.” He told the story of the trial of one of Matthew Shepard’s killers in which federal assistance was less than useful. “And the only thing that we did receive was some advice,” he said. “The advice [then-Attorney General] Janet Reno's office offered was that we wear blue shirts, as they appeared better on television cameras.” Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary, 106th Cong. 35 (1999)(statement of Kenneth Brown).

What justification exists for this redundancy? Back in 1998, Administration officials argued that it was needed, because state procedures often make it difficult to obtain convictions. They cited a Texas case involving an attack on several black men by three white hoodlums. Texas law required the three defendants to be tried separately. By prosecuting them under federal law, however, they could have been tried together. As a result, admissions made by one could be introduced into evidence at the trial of all three without falling foul of the hearsay rule.

One might expect that argument to send up red flags among civil libertarian groups like the ACLU. But political correctness seems to have caused them to abandon their traditional role as advocates for the accused.¹⁶ Still, the argument cries out: Isn't this just an end-run around state procedures designed to ensure a fair trial? The citizens of Texas evidently believe that separate trials are necessary to ensure innocent men and women are not punished. No one is claiming that Texas applies this rule only when the victim is black or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

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See ACLU Applauds Senate Introduction of Hate Crimes Legislation, available at www.aclu.org/lgbt/gen/29340prs20070412.html (April 12, 2007).

The Double Jeopardy Issue in Particular: The double jeopardy issue stands out among the problems created by the proposed statute (as well as other proposed expansions of the federal criminal code).¹⁷ It is also the issue that the U.S. Commission on Civil Rights featured most prominently in its letter to the Senate leadership opposing S. 909.

School children are taught that the Double Jeopardy Clause of the Constitution guarantees that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹⁸ They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. As the Supreme Court put it in *United States v. Lanza*, a defendant who violates the laws of two sovereigns has “committed two different offenses by the same act, and [therefore] a conviction by a court [of one sovereign] of the offense that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy.”¹⁹ A state cannot oust the federal government from jurisdiction by prosecuting first; similarly the federal government cannot oust the state. Indeed, New Jersey cannot oust New

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The ACLU endorsed the bill without any discussion of the potential double jeopardy issues it raises. See *supra* at n.16. But Judge Paul Cassell reports that the ACLU was split on the federal prosecution on the police officers accused of using excessive force against Rodney King following their acquittal on state charges. Although the ACLU’s Board of Directors ultimately mustered a vote of 37 to 29 to support the proposition that re-trials constitute double jeopardy, several chapters continued to demand that federal civil rights law be employed to prosecute the Rodney King defendants, notably the Southern California chapter, where the conduct took place. See Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693, 709-15 (1994). See Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights “Exception,”* 41 UCLA L. Rev. 649 (1994)(Legal Director of the ACLU Foundation of Southern California makes argument in favor of re-prosecutions in cases involving “civil rights”).

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U.S. Const. amend. V.

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260 U.S. 377, 382 (1922). See *Abbate v. United States*, 359 U.S. 187 (1959)(federal prosecution upheld following state conviction); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852)(dictum); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 424-35 (1847)(dictum).

York from jurisdiction over a crime over which they both have authority, so in theory at least a defendant may face as many of 51 prosecutions for the same incident.²⁰

The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the “prosecutorial punch,” it can, in effect, veto the implementation of federal policy (and vice versa). In 1922, the Court in *Lanza* put it in terms of Prohibition, which was then hotly controversial. Allowing a state to “punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines,” it wrote, will lead to “a race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution.”²¹

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At the time of *Lanza*, the Double Jeopardy Clause was thought not to apply to the states and some arguments for the dual sovereignty doctrine rely on that view. But the Supreme Court has held steadfastly to the dual sovereignty doctrine even after *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Clause had been incorporated through the Fourteenth Amendment. See *Heath v. Alabama*, 474 U.S. 82, 87-89 (1985) (case involving the dual sovereignty of Alabama and Georgia); *United States v. Wheeler*, 435 U.S. 313 (1978); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 *Colum. R. Rev.* 1, 11-18 (1995).

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260 U.S. at 385. See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (expressing concern over the doctrine while noting that “[t]he danger that one sovereign may negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence, is ... obvious”) (separate opinion of Calabresi, J.). See also Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 *N.Y.U. Rev. L. & Soc. Change* 383 (1986).

But the dual sovereignty doctrine is still at best troubling. And its most troubling aspect is that it applies even when the defendant has been acquitted of the same offense in the first court and is now being re-tried.²² Prosecutors in effect have two bites at the apple (or in a case in which two or more States are concerned, three, four, or five bites). The potential for abuse should be of concern to all Americans.

In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last few decades, this is no longer true.²³ The nation is facing the real possibility that double prosecutions could become routinely available to federal prosecutors who wish to employ them.

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See *Bartkus v. Illinois*, 359 U.S. 121 (1959)(state prosecution following federal acquittal upheld); *United States v. Avants*, 278 F.3d 510, 516 (5th Cir.), cert. denied 536 U.S. 968 (2002)(under the “dual sovereignty doctrine,” “the federal government may ... prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical”); *United States v. Farmer*, 924 F.2d 647, 650 (7th Cir. 1991)(a “double jeopardy claim based on [a] prior state acquittal of murder is defeated by the ‘dual sovereignty’ principle”).

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See generally James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese, III, Chair of the American Bar Association's Task Force on Federalization of Criminal Law, there are at least 3,000 federal crimes. See Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 Fed. Sentencing Rep. 129, 129 (1998).

S. 909 would add substantially to the problem in two ways.²⁴ By declining to require that the defendant be motivated by hatred or even malice in order to establish a “hate crime,” it would vastly expand the reach of the federal criminal code. A creative prosecutor will be able to charge defendants in a very broad range of cases—cases that ordinary users of the English language would never term “hate crimes.” And it makes the most controversial cases—those that were arguably motivated by race, color, religion, national origin, gender, sexual orientation, etc.—front and center on the federal stage.

It should come as no surprise that re-prosecutions are common in cases that are emotionally-charged—cases like the Rodney King prosecutions and the Crown Heights murders. As Judge Guido Calabresi put it:

“Among the important examples of successive federal-state prosecution are (1) the federal prosecution of the Los Angeles police officers accused of using excessive force on motorist Rodney King after their acquittal on state charges, (2) the federal prosecution of an African-American youth accused of murdering a Hasidic Jew in the Crown Heights section of Brooklyn, New York, after his acquittal on state charges, and (3) the Florida state prosecution—seeking the death penalty—of the anti-abortion zealot who had been convicted and sentenced to life imprisonment in federal court for killing an abortion doctor.”²⁵

While Judge Calabresi expressed no opinion about the merits of these cases, he noted that “there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts” and that it was “to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted.” It “is especially troublesome,” he stated, “that

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The ability to prosecute defendants in federal court after failed state prosecutions appears to be an important motivating factor behind S. 909. Former Attorney General Janet Reno, for example, told CNN in 1998, when the proposed legislation first surfaced that it would “give people the opportunity to have a forum in which justice can be done if it is not done in the state court.” Jacob Sullum, *Thought Crimes*, Reason Magazine (October 21, 1998), available at <http://www.reason.com/news/primer/35878.html>.

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United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 499 (2d Cir. 1995). High profile cases that involve re-prosecutions under 18 U.S.C. sec. 245(b) include: See *Koon v. United States*, 518 U.S. 81 (1996)(state acquittal); *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002)(state acquittal); *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986)(state sentence thought to be insufficient). In all three of these cases, public pressure to re-prosecute was significant.

the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern.”²⁶

²⁶

Id. at 499.

Hate crimes are perhaps the most emotionally-charged criminal issue in the nation today. According to CCN's Kyra Phillips, "Thousands of people converg[ed] on the U.S. Justice Department" on November 16, 2007 "demanding more federal prosecutions of hate crimes."²⁷

Can anyone seriously argue that political pressure of this sort will have no effect on the judgment of federal officials? Indeed, even before S. 909 has passed, advocacy groups have been calling for its use to overturn particular state court acquittals.²⁸

Proponents of the bill argue that the actual risk of abuse at the Department of Justice is quite minimal. DOJ has its own internal guidelines, known as the "Petite Policy," under which it limits double prosecutions to cases that meet certain standards. Unfortunately, the standards are vague. For example, they authorize double prosecutions whenever there are "substantial federal interests demonstrably unvindicated" by successful state procedures. Under ordinary circumstances those federal interests are undefined and undefinable. In this case, however, the potential for abuse is the result of the law's clarity. S. 909 specifically refers to "the federal interest in eradicating bias-motivated violence." That means essentially that if federal prosecutors want to bring a hate crimes prosecution after a state declines to prosecute, a state court acquits or a state court fails to sentence the defendant as harshly as federal prosecutors think is appropriate, the Petite Policy will never stand in their way. Moreover, courts have consistently held that a criminal defendant cannot invoke the Petite policy as a bar to federal prosecution.²⁹

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Thousands Protest Hate Crimes, CNN Newsroom Transcript (November 16, 2007)(available on Lexis/Nexis). According to the report, the Department of Justice spokesman said that the Department of Justice was aggressively pursuing hate crimes. One of the reasons cited for the failure to prosecute more hate crimes was the narrowness of the applicable statutes.

28

Corrine Yu, *Pennsylvania Teenagers Acquitted of Hate Crime; Federal Law Needed* (May 5, 2009)(quoting MALDEF interim president and general counsel as calling for the federal prosecution for the acquitted defendants), available at <http://www.civilrights.org/archives/2009/05/317-shenandoah.html>

29

See, e.g., *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir.), cert. denied, 440 U.S. 976 (1979) (noting that the Petite policy is "a mere housekeeping provision"); *United States v. Musgrove*, 581 F.2d 406, 407 (4th Cir. 1978) (stating the rule that "a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with [Petite] policy on dual prosecutions."); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978)("Our view that [the Petite policy] is at most a guide for the use of the Attorney General and the United States Attorneys in the field"); *United States v. Wallace*, 578 F.2d 735, 740 (8th Cir. 1978).

Conclusion: No one can deny the horror of violent crimes inspired by hatred of any kind. This is something upon which all decent people can agree. But it is precisely in those situations—where all decent people agree on the need to “do something”—that mistakes are made. Passage of the vaguely-worded prohibitions in S. 909 would be a giant step toward the federalization of all crime. Given the many civil liberties issues that would raise, including the routine potential of double jeopardy prosecutions, this is a step that members of the Senate should think twice before they take.